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931852 MAY 19 1994

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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY OWENS and CLARENCE OWNES,
Petitioners,

v.

TERRY LYNN HEWELL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a prosecution without probable cause for a traffic violation is a constitutional tort actionable under 42 U.S.C. 1983 for violation of Fourth Amendment protection only if accompanied by arrest or incarceration.

II. Whether the lower court erred in granting summary judgment to the Respondent on the basis of qualified immunity where the undisputed facts showed the law was clearly established and the Respondent violated the law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners MARY OWENS and CLARENCE OWENS respectfully petition the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the United States District Court without opinion. (Appendix A, *infra,* 1a; Appendix C, *infra,* 9a.) The opinion of the District Court was unreported. (Appendix B, *infra,* 3a.) The Court of Appeals subsequently denied Petitioners' request for rehearing. (Appendix D, *infra,* 11a.)

JURISDICTION

The court of appeals entered its judgment on January 7, 1994 (Appendix A, *infra,* 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTORY PROVISION INVOLVED

Section 1983 of the Civil Rights Act, 42 U.S.C. 1983, provides in relevant part, that a citizen shall have the right to redress when any rights guaranteed by the Constitution are violated or infringed upon in any way by a State or Federal officer, acting under color of authority.

STATEMENT

Petitioners, a husband and wife, sued Terry Lynn Hewell, Brian George, and the City of Loganville in February of 1993 in the United States District Court in the Northern District of Georgia, Atlanta Division. The suit was brought pursuant to 42 U.S.C. 1983 for alleged violations of Petitioner Mary Owens' rights under the 4th, 5th and 14th Amendments to the United States Constitution and pendant state claims for false arrest and malicious prosecution, and for loss of consortium for Petitioner Clarence E. Owens under pendant state law claims.

Prior to an answer being filed by the Respondents, and prior to any discovery, the Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The District Court granted the Respondents Motion to Dismiss and held that the giving of the traffic citation did not constitute an arrest, nor did the Petitioner's being subject to arrest or imprisonment constitute an arrest, so therefore there was no 4th Amendment violation.

The District Court additionally held that the Petitioner had no 5th Amendment claim for malicious prosecution because there was no evidence to show an egregious misuse of legal proceeding that deprived the Petitioner of a constitutional right, and there was no evidence suggesting the Respondents had any discriminatory, retaliatory, or unconstitutional motives for giving Petitioner the traffic citation.

The District Court further concluded that the Respondent was entitled to qualified immunity because he acted within his discretionary power in issuing the traffic citation and that a reasonable officer under the circumstances would have believed that giving the Petitioner the traffic citation did not amount to an illegal arrest or malicious prosecution.

The case was appealed and submitted on briefs. On January 7, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court. (Appendix A, *infra,* 1a; Appendix C, *infra,* 9a.) The Petitioner filed a Petition for Rehearing or Suggestion of Rehearing En Banc which was subsequently denied. (Appendix D, *infra,* 11a.)

A. Statement of Case

This case arises out of an automobile accident on October 29, 1991, wherein the Petitioner MARY OWENS pulled out onto the highway to execute a left hand turn and was struck by Respondent TERRY LYNN HEWELL, who was a police officer for the City of Loganville who had activated his blue light and accelerated to go after a person in the opposite lane of traffic who he deemed to have been speeding.

Respondent Georgia State Trooper BRIAN GEORGE was dispatched by his patrol post out of Lawrenceville to investigate the accident. When Respondent GEORGE arrived at the scene, the Petitioner had already been transported to the hospital. Respondent GEORGE investigated the accident scene and then went to the hospital to interview Respondent HEWELL. During the interview, Respondent HEWELL informed Respondent GEORGE that before the accident, Respondent HEWELL was not operating his siren.

Absent any probable cause to arrest the Petitioner, and with full knowledge that no siren was activated on Respondent Officer HEWELL's vehicle at the time of the accident, and the law was clearly established that in order

to have a violation of O.C.G.A. 40-6-74 (cited *infra*), the siren would have to have been activated. Respondent Officer HEWELL, in concert with Respondent Trooper GEORGE, charged the Petitioner with failure to yield the right-of-way to an emergency vehicle in violation of O.C.G.A. 40-6-74. They continued to have the unwarranted charges against the Petitioner prosecuted without any basis of legal justification.

During the time of which Petitioner OWENS was issued the traffic citation and notified of her March 30, 1993 court date, Petitioner was informed that if she did not appear in court on that date, a bench warrant would be issued for her arrest. Her freedom of movement and liberty was restrained in that she was required to appear in court on a day certain or subsequently be incarcerated should she refuse to do so. She was also informed that if she was found guilty of said charges, she was subject to incarceration for up to one year in the county jail and a maximum fine of $1,000.00.

As a direct and proximate cause of Respondents' conduct, Petitioner MARY OWENS experienced mental pain and anguish, and loss of property in that she had to pay for a lawyer to represent her.

The Petitioner was subsequently tried on said charges on March 30, 1992 in the Recorders Court for the County of Gwinnett, in the *State of Georgia v. Mary Owens*, File No. 716061 A. Respondents HEWELL and GEORGE both testified against the Petitioner, stating under oath that at the time of the accident, Respondent HEWELL did not have his siren activated. Petitioner MARY OWENS was acquitted of all charges against her.

At the time of the accident and ensuing citation, the Petitioner was not in violation of O.C.G.A. 40-6-74. This fact was known to the Respondents HEWELL and GEORGE at all times during Petitioner's citation and prosecution.

The question presented here is whether a prosecution without probable cause for a traffic violation is a constitu-

tional tort actionable under 42 U.S.C. Section 1983 for violation of the Fourth Amendment only if accompanied by arrest or incarceration.

B. Proceedings Below

On February 2, 1993 the Petitioners herein filed a civil lawsuit pursuant to 42 U.S.C. Sections 1981 and 1983 for violations of Petitioner OWENS' constitutional rights under the 4th, 5th and 14th Amendments, and pendent state claims for false arrest, malicious prosecution, and Petitioner CLARENCE OWENS' state law claim of loss of consortium.

In the complaint, Count I was a federal cause of action brought by Petitioner MARY OWENS pursuant to 42 U.S.C. Sections 1981 and 1983 for violations of her rights under the 4th, 5th and 14th Amendments to the United States Constitution.

Count II was a state cause of action brought by Petitioner MARY OWENS for false arrest and malicious prosecution.

Count III was a state cause of action brought by Petitioner MARY OWENS for punitive damages.

Count IV was a state cause of action brought by Petitioner MARY OWENS for negligence.

Count V was a state cause of action brought by Petitioner CLARENCE OWENS for loss of consortium.

Prior to the filing of an answer and prior to any discovery, the Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (F.R.C.P.) for failure to state a claim upon which relief can be granted. The District Court granted Respondents' Motion to Dismiss, and held that the giving of the traffic citation did not constitute an arrest, nor did the Petitioner being subject to arrest or imprisonment constitute an arrest, so therefore there was no Fourth Amendment violation. (Appendix B, *infra*, 3a.)

The District Court additionally held that the Petitioner had no 5th Amendment claim for malicious prosecution because there was no evidence to show an egregious misuse of legal proceeding that deprived the Petitioner of a constitutional right, and there was no evidence suggesting the respondent had any discriminatory, retaliatory, or unconstitutional motives for giving Petitioner the traffic citation. (Appendix B, *infra*, 3a.)

The District Court further concluded that the Respondent was entitled to qualified immunity because he acted within his discretionary power in issuing the traffic citation, and that a reasonable officer under the circumstances would have believed that giving the Petitioner the traffic citation did not amount to an illegal arrest or malicious prosecution. (Appendix B, *infra*, 3a.)

The case was appealed and submitted on briefs. On January 7, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court, without opinion. (Appendix A, *infra*, 1a.) The Petitioner filed a Petition for Rehearing or Suggestion of Rehearing En Banc which was subsequently denied. (Appendix D, *infra*, 11a.) It is from that decision that Petitioner respectfully appeals.

REASONS FOR GRANTING THE PETITION

This is a case of first impression in which this court must address the issue of whether a prosecution without probable cause for a traffic violation is a constitutional tort actionable under 42 U.S.C. 1983 for violation of Fourth Amendment protection only if accompanied by arrest or incarceration.

The United States Supreme Court, in the recent decision of *Kevin Albright, Petitioner v. Roger Oliver, etc., et al.*, 510 U.S. ——, 62 L.W. 4078 (1994), has left open the issue of whether a prosecution without probable cause is a constitutional tort actionable under 42 U.S.C. 1983 for Fourth Amendment protection only if accompanied by arrest or incarceration. The Court, in rendering the *Albright* decision, refused to resolve that issue, electing to defer consideration until such time that a case involving facts and circumstances that inherently give rise to that issue is presented before the court. This case presents this very issue.

The District Court, in the case at bar, ruled that a traffic citation which ultimately subjected Petitioner OWENS to arrest or imprisonment did not constitute an arrest which would invoke the protection of the Fourth Amendment. Petitioners contend, however, that this ruling is erroneous, in that it is inconsistent with previous holdings of the United States Supreme Court. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Pierson v. Ray*, 386 U.S. 547 (1967); *Henry v. United States*, 361 U.S. 98 (1959); *Brower v. County of Inyo*, 489 U.S. 593 (1989); *United States v. Marion*, 404 U.S. 307 (1971); *Kirby v. Illinois*, 406 U.S. 682, 689, 690 (1972); *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Seiser v. Randall*, 357 U.S. 513 (1958); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980); *Klopfer v. North Carolina*, 386 U.S. 213, 221, 222 (1967); *Gernstein v. Pugh*, 420 U.S.

103, 114 (1975); *Strunk v. United States*, 412 U.S. 434, 439 (1973); *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Paul v. Davis*, 424 U.S. 693 (1975).

The District Court's holding that there was no factual basis for an illegal arrest and malicious prosecution was erroneous in that law was clearly established, and the undisputed facts clearly showed lack of probable cause for her arrest and subsequent prosecution, and therefore the Respondents were not entitled to qualified immunity.

This case presents a timely and rare opportunity to provide guidance to the District Courts in regards to the issue of whether, under the Fourth Amendment, a prosecution without probable cause is actionable under 42 U.S.C. 1983 when it is not accompanied by arrest or incarceration, and to address the erroneous holdings of the District Court, and affirmation by the Court of Appeals, that based on undisputed facts, Respondents were entitled to qualified immunity.

I. THIS IS A CASE OF FIRST IMPRESSION IN WHICH THIS COURT MUST ADDRESS THE ISSUE OF WHETHER A PROSECUTION WITHOUT PROBABLE CAUSE FOR A TRAFFIC VIOLATION IS A CONSTITUTIONAL TORT ACTIONABLE UNDER 42 U.S.C. 1983 FOR VIOLATION OF FOURTH AMENDMENT PROTECTION ONLY IF ACCOMPANIED BY ARREST OR INCARCERATION.

The United States Court of Appeals erroneously affirmed, without opinion, the District Court's granting of Respondent's Rule 12(b)(6) Motion to Dismiss. The District Court held that Petitioner's arrest for a traffic violation, which ultimately subjected her to arrest and imprisonment, did not constitute an unlawful seizure in violation of the Fourth Amendment when it was given without probable cause or other substantial justification. This holding is inconsistent with many decisions previously rendered by this Court and other district court decisions. (*See Florida, et al., supra.*)

This Court, the lower district courts and the State Courts of Georgia have consistently ruled that an action for false arrest and/or wrongful detention (false imprisonment) may be brought under 42 U.S.C. Section 1983 for violation of the right to be free from unreasonable search and seizure under the Fourth Amendment, and the right to due process under the Fourteenth Amendment. See *Pierson, supra.* For a warrantless arrest, or any other seizure to be reasonable under the Fourth Amendment, the officer must have probable cause. *Id.* Probable cause to arrest exists where the facts and circumstances within the officer's knowledge, of which he has reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. See *Henry, supra*; *Draper v. United States*, 358 U.S. 307, 313 (1959); *United States v. Burgos*, 720 F.2d 1520, 1524 (1983) (citing *Brinegar* at 175, 176); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); See also *Durden v. State*, 250 Ga. 325, 297 S.E.2d 237 (1982); holding that the State and Federal rules on this issue are the same.

It is only when the nature and extent of a detention are so minimally intrusive of a person's Fourth Amendment interests, that the government can support a seizure based on less than probable cause. *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991) (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

This Court has held that a Fourth Amendment 'seizure' occurs when there is a governmental termination of freedom of movement through any means intentionally applied. See *Brower, supra.*

In *United States v. Marion*, the Court equated prosecution with arrest in stating "whether [the arrestee] is free on bail or not, the Government must assert probable cause to believe the arrestee has committed a crime." *Marion*, at 320. See also *United States v. Lovasco*, 431 U.S. 791, 792 (1977) (explaining why it would be un-

acceptable to require prosecutors to institute "immediate prosecution upon probable cause," that is, "as soon as they are entitled to do so"); *Hoffa v. United States*, 385 U.S. 293 (1966).

The most severe exercise of power by a government over its citizens lies in the initiation and pursuit of a criminal prosecution:

> The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society. . . .

Kirby v. Illinois, at 689, 690. The initiation of criminal process places the state's interests in "enforcing the law in the community's prosecution against the interests of transcending value . . . a criminal defendant has in his own liberty." *Brinegar v. United States*, at 176; *Speiser v. Randall*, 357 U.S. 513 (1958). The commencement of a prosecution itself results in a significant burden on a defendant, even if he is ultimately vindicated in the adjudication. *Marshall v. Jerrico, Inc.*, at 249. "Arrest is a public act that may seriously interfere with a defendant's liberty (whether or not he is free on bail) and also disrupt his employment, drain his financial resources, curtail his association, subject him to public ridicule, and create anxiety in him, his family and his friends." *United States v. Marion*, at 320. A criminal prosecution inherently limits the liberty of the accused: "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, association and participation in unpopular causes." *Klopfer v. North Carolina*, at 221, 222. "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." *Gernstein v. Pugh*, at 114. "Anxiety and concern" inevitably accompany public accusation from uncertainties in the prospect of facing public trial. *Strunk v. United States*, at 439; *United States v. Ewell*, at 120.

In the case at bar, Respondents, in their Motion to Dismiss contended that a mere issuance of a traffic ticket did not constitute a seizure and therefore there can be no Fourth Amendment violation.

In support of this position, Respondents relied on the case of *Vasque v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985) in arguing that a traffic citation, even if knowingly false and maliciously issued, cannot support a claim for unlawful arrest or malicious prosecution where there was no custodial arrest or threat of imprisonment. However, Respondents, the District Court and the United States Court of Appeals for the 11th Circuit, overlooked Georgia law and United States Supreme Court decisions when using this case as a supporting authority.

Under Georgia law, violation of the Uniform Rules of the Road as set forth in O.C.G.A. 40-6-1 et seq. is punishable as a criminal misdemeanor.

O.C.G.A. 40-6-1 states:

> It is unlawful and, unless otherwise declared in this chapter with respect to particular offenses, it is a *misdemeanor* for any person to do any act forbidden or fail to perform any act required in this chapter.

O.C.G.A. 40-6-74 states:

> (a) Upon the immediate approach of an authorized emergency vehicle or a vehicle belonging to a federal, state, or local *law enforcement agency making use of an audible signal and visual signals meeting the requirement of Code Section 40-6-6*, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle or law enforcement vehi-

> cle has passed, except when otherwise directed by a police officer.
>
> (b) This Code section shall not operate to relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highways.

O.C.G.A. 17-10-3 states:

> (a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished either:
>
> (1) By a *fine* not to exceed $1,000.00 or by *confinement* in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both; or
>
> (2) By confinement under the jurisdiction of the Board of Corrections in a state or county correctional institution or such other institution as the Department of Corrections may direct, for a determinate term of months which shall be more than six months but shall not exceed a total term of 12 months. . . .

In the *Vasque* case, cited by the Respondents, the court was very specific in their opinion that they were holding that there was no cause of action under 42 U.S.C. 1983 because, based on Michigan law, a person convicted of a parking violation was only punished by a fine, and not subject to incarceration. *Vasque*, at 773. Because the sentence in that case did not involve the threat of jail, Plaintiff had not undergone a "seizure" protected by the Fourth Amendment.

The case at bar is distinguishable from *Vasque* in that here, Petitioner was subject to incarceration, and therefore did undergo a "seizure." Petitioner was cited for violation of O.C.G.A. 40-6-74, which as an element of the Uniform Rules of the Road set forth in Title 40, authorizes incarceration for a period of one year and fines

up to $1,000.00. Once Petitioner was cited for this offense, she was subject to incarceration. Consequently, her freedom of movement and liberty interests were curtailed in several ways: she was required to appear in court for criminal prosecution on a specific date; she was subjected to public ridicule for an offense Respondents knew she did not commit; she had to expend her resources to retain legal counsel to defend the unwarranted charges; she underwent anxiety and mental distress and concern for both herself and her family. In all, the acts of Respondents were sufficient to constitute "seizure" within the meaning of the Fourth Amendment, thereby entitling Petitioner to the constitutional safeguards, namely, proof of probable cause to support the seizure.

In regards to the issue of probable cause, Petitioners alleged in Paragraph 7 of their complaint, that Respondents actions were:

> Absent any probable cause to arrest the plaintiff, and with full knowledge that no siren was activated on defendant officer T.L. Hewell's vehicle at the time of the accident and the law was clearly established that in order to have a violation of O.C.G.A. 40-6-74 the siren would have to have been activated, defendant Officer T.L. Hewell in concert with defendant Trooper Brian George, charged the plaintiff with failure to yield right-of-way to an emergency in vehicle in violation of O.C.G.A. 40-6-74. They continued to have the unwarranted charges against the plaintiff prosecuted with any legal justification.
>
> The plaintiff was subsequently tried on said charges on March 30, 1992 in the Recorders Court for the County of Gwinnett, *State of Georgia vs. Mary Owens,* File No. 716061 A and found not guilty.
>
> As the direct and proximate result of the unlawful arrest, and unlawful prosecution, the Plaintiff incurred attorneys fees, costs to make bond, suffered and continues to suffer extreme mental pain and anguish, and was subject to public ridicule by being

> unlawfully charged with a criminal misdemeanor violation and made to stand trial.

The Plaintiff's further alleged in paragraph 8:

> At the time of the accident and subsequent arrest the plaintiff was not in violation of any laws and this fact was known to the defendants.

The respondents in their Brief in Support of Motion to Dismiss, admitted that at the time they issued the citation to Mary Owens, both respondent Terry Lynn Hewell and respondent Brian George, knew Hewell did not have his siren activated and that this was a necessary element in order to prosecute someone for violation of O.C.G.A. 40-6-74. These admissions clearly showed a lack of probable cause and inference of malice.

Because the traffic citation issued to the Petitioner was for a criminal misdemeanor which subjected the Petitioner to incarceration and subjected her to drain on her financial resources, public ridicule, mental pain and anguish, and a public trial, and because the evidence was undisputed that the Respondents had no probable cause to issue the citation, the Petitioners' rights under the Fourth Amendment to the United States Constitution were violated and actionable under 42 U.S.C. 1983. The District Court Order and the United States Court of Appeals affirmance must be reversed.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS BECAUSE THE UNDISPUTED EVIDENCE SHOWED THE LAW WAS CLEARLY ESTABLISHED THEREFORE THE RESPONDENT WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In order to prevail on a motion to dismiss pursuant to Rule 12(b)(6) in case premised on 42 U.S.C. 1983, a defendant must satisfy the trial court that there is no set of facts which will support allegations that officer/officers (1) acted under color of state law, and (2)

deprived plaintiff of right secured by Constitution and laws. *United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083 (1979).

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Scheru*, 468 U.S. 183 (1983); *Mitchell v. Forsythe*, 469 U.S. 929 (1985). On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. The test to apply is not the subjective element of good faith, but focuses instead on the law at the time of the alleged constitution violation. *Harlow, supra*; *Acoff v. Abston*, 762 F.2d 1543, 1549 (11th Cir. 1985). An officer's mistake with respect to the issues of probable cause will be immunized if it (mistake) was objectively reasonable; that is, if a reasonable officer would not have known that the actions were illegal. *Anderson v. Creighton*, 107 S.Ct. 3034 (1987).

In determining whether the law was "clearly established" at the time of the officer's actions, the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. "Clearly established" requires "some, but not precise factual correspondence" between the relevant precedents and the conduct at issue, and demands that officials apply general, well developed legal principles. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1988); *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988).

Government officers and officials have a duty not only to know the law in the area in which they work, e.g. *Glasson v. City of Louisville,* 518 F.2d 899 (6th Cir. 1975), but to take reasonable steps to ascertain whether the actions are lawful, beyond simply relying on their own idea of what the law might be. *Harlow, supra,* at 821 (Brennan, J., concurring); *Salahuddin v. Coughlin,* 781 F.2d 24 (2nd Cir. 1986): see also, *Malley v. Briggs,* 475 U.S. 335 (1986); *McSurely v. McClellan,* 697 F.2d 309 (D.C. Cir. 1982).

Qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed,* 111 S.Ct. 1934, 1994 (1991).

It is the court's responsibility to determine if qualified immunity applies by determining if the actions of the defendants were objectvely reasonable, but in making that determination, the court is obliged to resolve all factual ambiguities in favor of the party opposing the motion. *Ansley v. Heinrich,* 925 F.2d 1339 (11th Cir. 1991) (citing *Goddard v. Urnea,* 847 F.2d 765 (11th Cir. 1988)).

To analyze the qualified immunity defense, the first issue to address is whether the law was clearly established at the time of the incident, and if so, whether the officer's actions were objectively reasonable.

O.C.G.A. 40-6-1 states:

> (a) Upon the immediate approach of an authorized emergency vehicle or a vehicle belonging to a federal, state, or local law enforcement agency *making use of an audible signal and visual signals* meeting with the requirements of Code Section 40-6-6, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the au-

> thorized emergency vehicle or law enforcement vehicle has passed, except when otherwise directed by a police officer.

O.C.G.A. 40-6-74 states:

> It is unlawful and, unless otherwise declared in this chapter with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this Chapter.

State court has jurisdiction over all misdemeaner offenses in county, including violations of this chapter. *Diamond v. State,* 151 Ga. App. 690, 261 S.E.2d 434 (1979).

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

Substantive due process rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action. *Fundiller v. City of Cooper City, supra* (citing *Casines v. Murchek,* 766 F.2d 1494, 1502 (11th Cir. 1985)).

Allegations that the defendants entered into a conspiracy to violate plaintiffs rights states a claim upon which relief could be granted. *United States ex rel. Rodriguez v. Weekly Publications, Inc.,* 68 F.Supp. 767 (1946).

Substantive due process is violated when the government engages in actions which 'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged wtih the most heinous offenses'. *Rochin v. California,* 342 U.S. 165 (1952). It is that conduct which "shocks the conscience" or constitutes force that is "brutal" and such as "to offend even the hardened sensibilities." *Id.,* at 172, 173.

There are "three categories of police-citizen encounters which invoke the Fourth amendment: police-citizen communications involving no coercion or detention; brief seizures or investigative detentions; and full-scale arrests." *United States v. Hastamorir,* 881 F.2d 1551, 1556 (11th Cir. 1989). Only the latter two invoke Fourth amendment scrutiny.

"Whenever an officer restrains the freedom of a person to walk away, he has seized the person." *Tennessee v. Garner,* 105 S.Ct. 1694, 1699 (1985). Under that standard, a seizure is not unconstitutional unless "unreasonable". Reasonableness is to be determined by 'balancing the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.' *Id.,* at 1699 (quoting *United States v. Place,* at 703.) In conducting the balancing test, the court is to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979).

As action for false arrest and/or detention (false imprisonment) may be brought under 1983 for violation of the Fourth and Fourteenth Amendments. See *Pierson, supra*; *Motes v. Myers,* 810 F.2d 1055 (11th Cir. 1987).

Law enforcement officers may make warrantless arrests where there are "reasonable grounds to believe" that a crime has been committed and the person arrested has committed the offense. *Henry v. United States, supra.*

In a warrantless arrest, in order to prove a constitutional violation the plaintiff must show that she was arrested without a warrant and without probable cause. *McIntosh v. Arkansas Republican Party,* 816 F.2d 409 (8th Cir. 1987).

An arrest occurs when, in view of all the circumstances surrounding an incident, a reasonable person would have

believed he was not free to leave. *Id.*, (citing *United States v. Hammock,* 860 F.2d 390, 393 (11th Cir. 1988)). As the *Hastamorir* Court explained,

> Circumstances which indicate an arrest include: the blocking of an individual's path or the impeding of his progress; the display of weapons; the number of officers present and their demeanor; the length of the detention; and the extent to which the officers physically restrained the individual. This list is not exclusive.

United States v. Hastamorir, at 1556.

For an arrest to have been reasonable, the officer must have probable cause. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge, of which he has reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *Draper,* at 313; *United States v. Burgos,* at 1524 (citing *Brinegar,* at 175, 176); *Beck v. Ohio,* at 91; See also *Durden, supra,* holding that the State and Federal rules are the same.

Probable cause means reasonable grounds, and is that apparent state of facts which seems to exist after reasonable and proper inquiry. *Bradford v. State,* 149 Ga.App. 839, 256 S.E.2d 84 (1979).

It is only when the nature and extent of a detention are minimally intrusive of the individual's Fourth Amendment interests, can the opposing law enforcement interest support a seizure based on less than probable cause. *Courson v. McMillian, supra* (citing *United States v. Place,* at 703).

The test of probable cause is whether it would justify a person of reasonable caution in believing that an offense has been or is being committed, and this requires probability which is less than a certainty but more than a mere

suspicion or possibility. *Lewis v. State,* 255 Ga. 101, 335 S.E.2d 560 (1985).

The undisputed facts, as alleged in the complaint, and as set forth in the respondents Brief in Support of their Motion to Dismiss, clearly showed that at the time respondent George issued the misdemeanor citation to the petitioner Mary Owens that he had consulted with respondent Hewell and they were both fully aware that at the time of the accident respondent Hewell did not have his siren activated. The law was clearly established that in order to be in violation of O.C.G.A. 40-6-74 the police officer would have had to have both siren and audible flashing lights activated. As police officers they both knew, or should have known, that in order for the petitioner Mary Owens to have been in violation of O.C.G.A. 40-6-74, failing to yield to an emergency vehicle, the emergency vehicle would have had to have both its siren and audible lights flashing. By issuing the unlawful citation to petitioner Mary Owens, when there was clearly no probable cause to issue same, they clearly violated clearly established law and would therefore not be entitled to qualified immunity, and the District Court erred in dismissing the action against Defendant George and the Court of Appeals erred in affirming.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

This Court in *Albright v. Oliver, supra,* addressed at length the issue of whether a person has a cause of action under 42 U.S.C. 1983 for prosecution without probable cause under the substantive due process under the Fourteenth Amendment. The court left open the question of whether a claim under 42 U.S.C. 1983 of the right to be free from prosecution without probable cause can be addressed under the Fourth Amendment. Because this question has not been addressed by the Supreme Court and the lower courts appear to be in substantial disarray on this matter of importance, this case presents a rare

opportunity for this Court to address this issue and to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

In consideration of the foregoing facts and principles of law, Petitioner respectfully suggests that this High Court declare that this Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

D.C. Docket No. 1:93-CV-251-MHS

MARY OWENS, CLARENCE E. OWENS,
Plaintiffs-Appellants,

versus

TERRY LYNN HEWELL, individually and in his capacity as a Police Officer for the City of Loganville, Georgia; BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol; CITY OF LOGANVILLE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 7, 1994)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

Judgment Entered: January 7, 1994
For the Court: Miguel J. Coretz, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/11/94

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:93-cv-251-MHS

MARY OWENS and CLARENCE OWENS,
Plaintiffs,

v.

TERRY LYNN HEWELL, *et al.*,
Defendants.

ORDER

This action is before the Court on defendants' motions to dismiss. For the reasons stated below, the Court grants the motions.

In October 1991, a police car driven by defendant Officer Terry Lynn Hewell struck plaintiff Mary Owens's car when plaintiff's car entered an intersection. While plaintiff was being treated in a hospital for her injuries, defendant Hewell and defendant Brian George, the Georgia State Patrol officer who investigated the collision, gave plaintiff a traffic citation charging her with violating a state law requiring motorists to yield to an approaching emergency vehicle. At county traffic court, plaintiff's traffic citation was dismissed since defendant Hewell did not have on his siren before the accident occurred.

Plaintiff brings this action under 42 U.S.C. § 1983, claiming that defendants subjected her to an illegal arrest in violation of the Fourth Amendment and maliciously prosecuted her in violation of the Fifth Amendment Plaintiff has supplemental state law claims for false ar-

rest, malicious prosecution, intentional infliction of emotional distress, negligence, and loss of consortium; plaintiff also seeks punitive damages. Defendants City of Loganville and Hewell move to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted, and defendant George moves to dismiss on the ground of qualified immunity.

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Court first examines defendants City of Loganville and Terry Lynn Hewell's motio to dismiss for failure to state a claim upon which relief can be granted. Under Federal Rule of Civil Procedure 12(b)(6), a district court can dismiss an action for failure to state a claim upon which relief can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1439 (11th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Defendants City of Loganville and Terry Lynn Hewell first argue that plaintiff has failed to state a claim for illegal arrest under the Fourth Amendment. Specifically, defendants argue that they cannot be liable to plaintiff for an illegal arrest under the Fourth Amendment because plaintiff was never arrested, even when defendants gave her a traffic citation in the hospital. In response, plaintiff argues that she was subject to arrest and imprisonment of up to one year for her alleged violation of O.C.G.A. § 40-6-74(a) (1991), and that if she had not appeared at traffic court, she would have been arrested.

Generally, a person is seized within the meaning of the Fourth Amendment only if, considering the surrounding circumstances of the incident, a reasonable person would believe that she was not free to leave. *United States v.*

Mendenhall, 446 U.S. 544, 554 (1980); *cf. Florida v. Roper*, 460 U.S. 491, 498 (1983). Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff's being subject to arrest or subject to imprisonment is not an arrest. Nor is defendants' giving plaintiff a traffic citation while she was in the hospital an arrest. *See United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985); *United States v. Lunt*, 732 F. Supp. 599, 604 (W.D. Pa. 1990). Further, no evidence shows that plaintiff was in custody at the time she appeared in county traffic court. On these facts, plaintiff has failed to make out a claim for illegal arrest under the Fourth Amendment.

Defendants City of Loganville and Hewell next argue that plaintiff has failed to state a claim for malicious prosecution under the Fifth Amendment. Defendants argue that while a claim for malicious prosecution can rise to a constitutional deprivation, plaintiff has not alleged that defendants used governmental power in an egregious or shocking way and therefore violated plaintiff's constitutional rights. Plaintiff argues that she has made out a claim for malicious prosecution under Georgia law.

Generally, a malicious prosecution claim can support a claim for relief under § 1983. *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990). The majority of circuits, however, hold that § 1983 provides a remedy only if the misuse of the legal proceedings is so egregious that it deprives the plaintiff of a constitutional right. *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990). Thns, a plaintiff must not only prove the elments of malicious prosecution under state law,[1] but also must

[1] Under Georgia law, a plaintiff bringing a malicious prosecution claim must prove the following elements: (1) prosecution for a criminal offense; (2) the prosecution was instigated under a valid warrant, accusation, or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) lack of probable cause; and (6) damage to the plaintiff. *Medoc Corp. v. Keel*, 166 Ga. App. 615, 615-16 (1983).

show egregious conduct by the governmental official that rises to the level of a constitutional deprivation. *Id.*

Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff has failed to state a claim for malicious prosecution that amounts to a violation of § 1983. Plaintiff has not shown an egregious misuse of legal proceedings that deprived her of a constitutional right. Defendants had a reasonable basis for charging plaintiff with violating section 40-6-74(a), and no evidence suggests that defendants had any discriminatory, retaliatory, or unconstitutional motive for giving plaintiff the traffic citation. Plaintiff then has also failed to state a claim for malicious prosecution under § 1983.

II. MOTION TO DISMISS ON QUALIFIED IMMUNITY DEFENSE

The Court next examines defendant Brian George's motion to dismiss on the ground that he is entitled to the defense of qualified immunity.[2] Plaintiff argues that defendant George is not entitled to the defense on these facts. Under the "objective-reasonableness" test, a court must evaluate a government official's action against clearly established federal statutory or constitutional rights of which a reasonable person would have knowledge. *Courson v. McMillian,* 939 F.2d 1479, 1487 (11th Cir. 1991). District courts should not focus on the official's subjective good faith in § 1983 actions but rather on whether a reasonable official under the circumstances would have known that his conduct violated clearly established law. *Id.* Qualified immunity protection is usually provided to "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)).

This Circuit has adopted a two-part analysis for applying the objective-reasonableness test to a qualified immu-

[2] Plaintiff also brought her claims for illegal arrest and malicious prosecution against defendant George.

nity defense. *Id.* First, the defendant public official must show that he acted within the scope of his discretionary authority when the allegedly wrongful act occurred. *Id.* Second, after the defendant has shown that he acted within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the defendant lacked good faith, that is, that the defendant's acts violated clearly established statutory or constitutional law. *Id.* The second part of the analysis requires the Court to determine whether the applicable law was clearly established when the government action in question occurred and then whether the government official's conduct was in violation of clearly estabished law. *Id.* at 1487-88.

On these facts, the Court concludes that defendant George is entitled to the defense of qualified immunity on plaintiff's Fourth Amendment claim of illegal arrest and Fifth Amendment claim of malicious prosecution. Defendant George acted within the scope of his discretionary authority when he gave plaintiff her traffic citation. Further, a reasonable officer under these circumstances would have believed that giving plaintiff the traffic citation in this instance did not amount to an illegal arrest or malicious prosecution and therefore comported with the Fourth and Fifth Amendments. *Anderson v. Creighton*, 483 U.S. 635, 647 (1984). As concluded above, there is no factual basis for an illegal arrest on malicious prosecution in this action.

III. PLAINTIFF'S SUPPLEMENTAL STATE LAW CLAIMS

Defendants urge the Court to decline to exercise supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(c). While the exercise of supplemental jurisdiction is discretionary, *see Hubbard v. Stewart*, 651 F. Supp. 294 (M.D. Ga. 1987), if a district court dismisses a plaintiff's federal claims before trial, then, under *United Mine Workers v. Gibbs*, 383

U.S. 715, 726 (1966), the court must dismiss the plaintiff's supplemental state law claims. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984); *accord Homes by Michelle, Inc. v. Federal Savings Bank*, 733 F. Supp. 1495, 1498 (N.D. Ga. 1990). Therefore, the Court dismisses plaintiff's state law claims.

IV. CONCLUSION

In summary, the Court GRANTS defendants City of Loganville and Terry Lynn Hewell's motion to dismiss [#4-1], GRANTS defendant Brian George's motion to dismiss [#5-1], and DISMISSES plaintiff's remaining state law claims.

IT IS SO ORDERED, this 27 day of April, 1993.

ENTERED ON DOCKET

Apr. 29, 1993

By L.D.T., Clerk
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:93-cv-251-MHS

MARY OWENS, *et al.*,
Plaintiffs,

vs.

TERRY LYNN HEWELL, *et al.*,
Defendants.

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, United States District Judge, for consideration of the defendants' motions to dismiss, and the court having granted said motions, it is

Ordered and Adjudged that the plaintiff take nothing, that the defendants recover their costs of this action, and the action be, and the same hereby is dismissed.

Dated at Atlanta, Georgia, this 29th day of April, 1993.

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 29, 1993

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

APPENDIX D

[Filed Feb. 25, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

MARY OWENS, CLARENCE E. OWENS,
Plaintiffs-Appellants,

versus

TERRY LYNN HEWELL, individually and in his capacity as a Police Officer for the City of Loganville, Georgia, BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol, CITY OF LOGANVILLE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
Chief Judge

(2)

Supreme Court, U.S.
FILED
JUN 20 1994
OFFICE OF THE CLERK

No. 93-1852

In The

Supreme Court of the United States

October Term, 1993

MARY OWENS and CLARENCE OWENS,

Petitioners,

v.

TERRY LYNN HEWELL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION BY RESPONDENTS HEWELL AND THE CITY OF LOGANVILLE

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June 20, 1994

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the District Court properly applied Fourth Amendment law in granting a dismissal under Fed. R. Civ. P. § 12(b)(6) to a police officer and municipality in a false arrest action brought by one who was given a traffic citation for failure to yield to an emergency vehicle while she was in the hospital following an accident with that police vehicle, driven by respondent Hewell.

LIST OF PARTIES

The parties to the proceedings below and in this Court are the petitioners, Mary Owens and Clarence Owens, and the respondents, Terry Lynn Hewell, Brian George, and the City of Loganville, Georgia.

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No. 93-1852

In The

Supreme Court of the United States

October Term, 1993

MARY OWENS and CLARENCE OWENS,

Petitioners,

v.

TERRY LYNN HEWELL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION BY RESPONDENTS HEWELL AND THE CITY OF LOGANVILLE

OPINIONS BELOW

The Court of Appeals affirmed the decision of the District Court without opinion, reprinted in the Appendix hereto, page 1a. The decision of the District Court also was not published, but has been reprinted in the Appendix hereto, page 3a.

STATEMENT OF JURISDICTION

The petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs' Complaint, filed on February 2, 1993, alleges that the defendants subjected Mary Owens to an unconstitutional arrest and prosecution, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Count One, denominated as a "Civil Rights Action," seeks relief under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 for these alleged unconstitutional deprivations.

Defendants Hewell and City of Loganville, by motion filed on March 10, 1993, moved to dismiss plaintiffs' civil rights claims pursuant to Fed. R. Civ. P. 12(b)(6), on the ground that plaintiffs' allegations, even if accepted as true, failed to state a claim upon which relief could be granted under the civil rights statutes. Defendant George filed a similar motion on March 12, 1993, and he also moved to dismiss on the ground of qualified immunity. Plaintiffs responded to these motions on April 5 and 15, 1993, respectively.

By order entered April 28, 1993, the Honorable Marvin H. Shoob granted the defendants' motions to dismiss. *See* Order of the District Court, Appendix hereto, page 3a. The District Court determined that plaintiffs' allegations and evidence, even if accepted as true, failed to state a civil rights claim for an unconstitutional arrest or malicious prosecution. The district court also ruled defendant George was entitled to qualified immunity, and that plaintiffs' state law claims should be dismissed upon the dismissal of plaintiffs' federal claims, as authorized by 28 U.S.C. § 1367(c)(3).

Final judgment was entered in favor of the defendants on April 29, 1993. Plaintiffs commenced an appeal to the Eleventh Circuit Court of Appeals on May 3, 1993. The Court of Appeals affirmed the judgment of the district court without opinion on January 7, 1994. *See* Judgment of the Eleventh Circuit Court of Appeals, Appendix hereto, page 1a. Plaintiffs then petitioned the Eleventh Circuit for rehearing, which it denied.

B. Statement of the Facts

This case arises from a motor vehicle accident involving the plaintiffs' vehicle and a police car driven by respondent Hewell (a City of Loganville police officer). As alleged in plaintiffs' Complaint, Ms. Owens was stopped at a stop sign on Brand Road at its intersection with Highway 78 in Loganville, Georgia. Ms. Owens attempted to proceed through the intersection, but was struck by Officer Hewell's patrol car as it proceeded west-bound on Highway 78. Plaintiffs' Complaint states that at the time of the collision Officer Hewell was allegedly pursuing a traffic violator, and that he was traveling at a high rate of speed with an activated blue light and head lights, but with no siren. In connection with plaintiffs' brief in opposition to the defendants' motion to dismiss, plaintiffs filed a partial transcript of the sworn testimony of Officer Hewell, wherein he stated he was pursuing a violator who had been clocked on radar at 68 miles per hour in a 45 mile per hour zone. Officer Hewell has never denied that he failed to activate his siren prior to the collision, either in sworn testimony or in his motion to dismiss.

Ms. Owens was injured in the collision, and she was admitted to a local hospital for treatment. Trooper Brian George of the Georgia State Patrol investigated the accident. Respondent George determined Ms. Owens had failed to yield the right-of-way to Officer Hewell, and he issued Ms. Owens a traffic citation charging her with a violation of O.C.G.A. § 40-6-74. That statute requires all motorists to yield on the approach of an emergency vehicle. According to Ms. Owens' affidavit, Trooper George gave her the ticket while she was in the hospital. Plaintiff does *not* allege that she was interrogated, detained, taken into custody, handcuffed, fingerprinted, photographed, booked-in, or in any way physically restrained by either Hewell or George in connection with the issuance of the ticket. She was simply informed that she was required to appear in traffic court on March 30, 1992.

Because Officer Hewell conceded he did not have his siren on prior to the accident, Ms. Owens successfully argued that the patrol car did not qualify as an "emergency vehicle" within the meaning of O.C.G.A. § 40-6-74, and the traffic charge was dismissed at trial. Based on these "facts" as alleged in the Complaint, petitioners claim Ms. Owens' civil rights were violated because she was subjected to an unconstitutional arrest.

SUMMARY OF ARGUMENT

Ms. Owens was not arrested or "seized" within the meaning of the Fourth Amendment. Her initial contact with Officer Hewell was the result of an unintentional

accident, not a deliberate traffic stop or "pull over." Neither that event nor the issuance of the traffic ticket by Trooper George qualify as arrests. None of the indicia of an arrest are alleged in plaintiffs' Complaint: Her freedom of movement was not blocked or impeded by the Trooper; no weapons were displayed; she was not surrounded by numerous officers; no hostile or coercive acts or words have been pled; she was not detained for any length of time; and she was never touched by an officer. The allegedly malicious prosecution of a charge which carries with it the possibility of future incarceration does not amount to a present seizure of the person.

ARGUMENT

THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER MARY OWENS WAS NOT ARRESTED OR "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT AND DISMISSED HER CLAIM AGAINST RESPONDENTS

In Count One of their Complaint, petitioners contend that Mary Owens was "arrested," that her arrest was "unlawful" and "illegal," and that it was made in the absence of any probable cause. Petitioners claim this "arrest" violated her rights under the Fourth Amendment.

The Fourth Amendment provides protection against unreasonable "seizures" of the person. U.S. Const. amend. IV. If made without any probable cause, an arrest is unreasonable and thus prohibited by the Fourth Amendment. While petitioner asserts that there was no

probable cause for her arrest in the circumstances of this case, respondents show that the issue before the Court with respect to the dismissal of plaintiffs' Fourth Amendment claim is whether the facts alleged by the petitioners state a claim that Ms. Owens was "seized" at all.

Petitioner claims that she was seized because she was given a traffic ticket while she was in the hospital and told that she would have to appear in court at some future time. A person is seized or arrested within the meaning of the Fourth Amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also Florida v. Royer*, 460 U.S. 491, 501 (1983), *United States v. Hastamorir*, 881 F.2d 1551, 1556 (11th Cir. 1989).

Circumstances that indicate an arrest has occurred include the blocking of an individual's path, or the impeding of his progress, the display of weapons, the number and demeanor of officers present, the length of the detention, and the extent to which the officers physically restrained the individual. *Hastamorir*, 881 F.2d at 1556, *citing United States v. Hammock*, 860 F.2d 390 (11th Cir. 1988) (list is not exclusive). Ms. Owens' initial contact with the police, the car accident, is not alleged to have been intentional or deliberate. Respondent Hewell did not "arrest" Ms. Owens by accidentally crashing into her. The word "seizure" "can hardly be applied to an unknowing act." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). *See Campbell v. White*, 916 F.2d 421, 422-23 (7th Cir. 1990); *Apodaca v. Rio Arriba County Sheriff's Department*, 905 F.2d 1445, 1447 (10th Cir. 1990); *Roach v. City of*

Fredericktown, 882 F.2d 294, 296-97 (8th Cir. 1989) (collision between police officer who did not activate siren in violation of state law and another car did not constitute a seizure where officer did not intend for pursuit to end by means of an accident). Petitioners contend that the officers arrested or seized Ms. Owens when she was given a traffic ticket while she was in the hospital and Trooper George told her she would have to appear in traffic court on March 30, 1992. Petitioners have alleged no other facts concerning the manner in which the ticket was given to her and do not allege that she was interrogated, taken into custody, handcuffed, fingerprinted, photographed, or otherwise "booked-in" on the traffic charge. While Ms. Owens was apparently confined to a hospital bed by medical personnel, she does not allege that the *police* restrained her while she was in the hospital, physically or otherwise. *See United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1986) and *United States v. Lunt*, 732 F.Supp. 599, 604 (W.D. Pa. 1990) (questioning a hospital patient was not an "arrest" and the patient was not "in custody" so as to require *Miranda* warnings).

Under the circumstances articulated by the Eleventh Circuit Court of Appeals in *Hastamorir* and *Hammock*, it is clear Ms. Owens was never arrested or seized within the meaning of the Fourth Amendment. Petitioner has alleged that only one officer was present when she was given the ticket. She does not allege that numerous officers surrounded her, nor that any weapons were brandished, nor that Trooper George physically touched her, detained her for any length of time, or exhibited a hostile or threatening demeanor.

Petitioners' primary argument that Ms. Owens was "seized" within the meaning of the Fourth Amendment is that once she was charged with a violation of O.C.G.A. § 40-6-74, she was subject to being found guilty of a misdemeanor that carried a possible punishment of up to one (1) year imprisonment. Petitioner argues that once she was cited for this offense, she was subject to incarceration and that, consequently, her freedom of movement and liberty interests were curtailed. Petitioners cite to *United States v. Marion*, 404 U.S. 307, 320 (1971) in support of their position. However, in *Marion*, this Court focused on governmental action that will trigger an accused's Sixth Amendment right to a speedy trial, not the parameters of a Fourth Amendment seizure. *Id.* The protections of the speedy trial clause come into existence through "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. . . . " *Id. Marion* does not equate arrest and ultimate prosecution for purposes of the Fourth Amendment in the manner petitioners contend. Though Ms. Owens may have been an "accused" for purposes of the Sixth Amendment right to a speedy trial, she had not been arrested or seized for purposes of Fourth Amendment protection.

Respondents respectfully submit that the *possibility of future incarceration*, even with its accompanying anxiety and concern, is not the legal equivalent of a present seizure or an immediate restraint on an individual's freedom of movement. The district court correctly ruled even though Ms. Owens may have been *subject* to arrest or *subject* to imprisonment, she simply was not "arrested" on March 30, 1992 when she received a traffic ticket.

Petitioners rely on this Court's decision in *Albright v. Oliver*, 510 U.S. ___, 62 L.W. 4078 (1994) to support their petition for certiorari, contending that this decision left open the question of whether a prosecution without probable cause is actionable under § 1983 as a violation of the Fourth Amendment, even if there has been no pretrial deprivation of liberty. In *Albright*, the petitioner had been arrested and prosecuted without probable cause. *Id.* at 4079. He brought an action under 42 U.S.C. § 1983 based upon his substantive due process right to be free from prosecution without probable cause. *Id.* This Court affirmed the district court's dismissal under Rule 12(b)(6), holding that "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claims must be judged. . . . Petitioner [does not] claim a violation of his Fourth Amendment rights, notwithstanding the fact that his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment." *Id.* at 4079.

This Court did not address a Fourth Amendment claim in *Albright* because none had been raised by the petitioner. The Court did not thereby intend to leave open the question of whether a prosecution without probable cause is actionable under the Fourth Amendment where there has been no arrest or incarceration, as petitioner argues. This Court did not indicate that it would address this issue if presented with a more factually appropriate case. Even if the Court had expressed such an intention, however, petitioners' case does not present a valid claim for a Fourth Amendment violation since petitioner

Owens was not arrested or "seized" within the meaning of that amendment.

CONCLUSION

Under the facts as alleged by petitioners, Ms. Owens was simply not arrested or seized when she was given the citation. Her path was not blocked and her progress was not impeded by the police. No weapons were drawn, no detention occurred, and she was not touched or restrained by the police in any way. In giving Ms. Owens the ticket, the officer simply notified her that she was being charged with causing the accident and violating a traffic law. She was informed that she must appear in court to answer the charge, but at the time she had this encounter with the police she was free to leave, if not for her injuries and medical treatment. Even when these facts as pled by the petitioners are viewed in the light most favorable to them, it is clear Ms. Owens was not arrested. Petitioners' claim is not actionable under 42 U.S.C. § 1983 because there has been no violation of a constitutional right upon which to base § 1983 liability. The district court properly granted the respondents' motion to dismiss petitioners' Fourth Amendment claims, and its decision is fully supported by the record.

For these reasons, respondents Hewell and the City of Loganville respectfully urge the Court to deny the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted,

BARNHART, O'QUINN & WILLIAMS
MICHAEL A. O'QUINN
Counsel of Record for Respondents Hewell and the City of Loganville

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APPENDIX OF RESPONDENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

D.C. Docket No. 1:93-CV-251-MHS

MARY OWENS, CLARENCE E. OWENS,
PLAINTIFFS-APPELLANTS,

VERSUS

TERRY LYNN HEWELL, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER FOR THE CITY OF LOGANVILLE, GEORGIA; BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol; CITY OF LOGANVILLE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(January 7, 1994)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

PER CURIAM:

AFFIRMED, *See* 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

Judgment Entered: January 7, 1994
For the Court: Miguel J. Coretz, Clerk

By: /s/ Matt Davidson

Deputy Clerk

ISSUED AS MANDATE: 3/11/94

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:93-cv-251-MHS

MARY OWENS and CLARENCE OWENS,
Plaintiffs,

v.

TERRY LYNN HEWELL, *et al.*,
Defendants.

ORDER

This action is before the Court on defendants' motions to dismiss. For the reasons stated below, the Court grants the motions.

In October 1991, a police car driven by defendant Officer Terry Lynn Hewell struck plaintiff Mary Owens's car when plaintiff's car entered an intersection. While plaintiff was being treated in a hospital for her injuries, defendant Hewell and defendant Brian George, the Georgia State Patrol officer who investigated the collision, gave plaintiff a traffic citation charging her with violating a state law requiring motorists to yield to an approaching emergency vehicle. At county traffic court, plaintiff's traffic citation was dismissed since defendant Hewell did not have on his siren before the accident occurred.

Plaintiff brings this action under 42 U.S.C. § 1983, claiming that defendants subjected her to an illegal arrest in violation of the Fourth Amendment and maliciously

prosecuted her in violation of the Fifth Amendment. Plaintiff has supplemental state law claims for false arrest, malicious prosecution, intentional infliction of emotional distress, negligence, and loss of consortium; plaintiff also seeks punitive damages. Defendants City of Loganville and Hewell move to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted, and defendant George moves to dismiss on the ground of qualified immunity.

I. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Court first examines defendants City of Loganville and Terry Lynn Hewell's motion to dismiss for failure to state a claim upon which relief can be granted. Under Federal Rule of Civil Procedure 12(b)(6), a district court can dismiss an action for failure to state a claim upon which relief can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1439 (11th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Defendants City of Loganville and Terry Lynn Hewell first argue that plaintiff has failed to state a claim for illegal arrest under the Fourth Amendment. Specifically, defendants argue that they cannot be liable to plaintiff for an illegal arrest under the Fourth Amendment because plaintiff was never arrested, even when defendants gave her a traffic citation in the hospital. In response, plaintiff argues that she was subject to arrest

and imprisonment of up to one year for her alleged violation of O.C.G.A. § 40-6-74(a) (1991), and that if she had not appeared at traffic court, she would have been arrested.

Generally, a person is seized within the meaning of the Fourth Amendment only if, considering the surrounding circumstances of the incident, a reasonable person would believe that she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *cf. Florida v. Roper*, 460 U.S. 491, 498 (1983). Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff's being subject to arrest or subject to imprisonment is not an arrest. Nor is defendants' giving plaintiff a traffic citation while she was in the hospital an arrest. *See United States v. Martin*, 781 F.2d 671, 673 (9th Cir. 1985); *United States v. Lunt*, 732 F. Supp. 599, 604 (W.D. Pa. 1990). Further, no evidence shows that plaintiff was in custody at the time she appeared in county traffic court. On these facts, plaintiff has failed to make out a claim for illegal arrest under the Fourth Amendment.

Defendants City of Loganville and Hewell next argue that plaintiff has failed to state a claim for malicious prosecution under the Fifth Amendment. Defendants argue that while a claim for malicious prosecution can rise to a constitutional deprivation, plaintiff has not alleged that defendants used governmental power in an egregious or shocking way and therefore violated plaintiff's constitutional rights. Plaintiff argues that she has made out a claim for malicious prosecution under Georgia law.

Generally, a malicious prosecution claim can support a claim for relief under § 1983. *NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990). The majority of circuits, however, hold that § 1983 provides a remedy only if the misuse of the legal proceedings is so egregious that it deprives the plaintiff of a constitutional right. *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990). Thus, a plaintiff must not only prove the elements of malicious prosecution under state law,[1] but also must show egregious conduct by the governmental official that rises to the level of a constitutional deprivation. *Id.*

Construing the pleadings in favor of plaintiff, the Court concludes that plaintiff has failed to state a claim for malicious prosecution that amounts to a violation of § 1983. Plaintiff has not shown an egregious misuse of legal proceedings that deprived her of a constitutional right. Defendants had a reasonable basis for charging plaintiff with violating section 40-6-74(a), and no evidence suggests that defendants had any discriminatory, retaliatory, or unconstitutional motive for giving plaintiff the traffic citation. Plaintiff then has also failed to state a claim for malicious prosecution under § 1983.

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[1] Under Georgia law, a plaintiff bringing a malicious prosecution claim must prove the following elements: (1) prosecution for a criminal offense; (2) the prosecution was instigated under a valid warrant, accusation, or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) lack of probable cause; and (6) damage to the plaintiff. *Medoc Corp. v. Keel*, 166 Ga. App. 615, 615-16 (1983).

II. MOTION TO DISMISS ON QUALIFIED IMMUNITY DEFENSE

The Court next examines defendant Brian George's motion to dismiss on the ground that he is entitled to the defense of qualified immunity.[2] Plaintiff argues that defendant George is not entitled to the defense on these facts. Under the "objective-reasonableness" test, a court must evaluate a government official's action against clearly established federal statutory or constitutional rights of which a reasonable person would have knowledge. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991). District courts should not focus on the official's subjective good faith in § 1983 actions but rather on whether a reasonable official under the circumstances would have known that his conduct violated clearly established law. *Id.* Qualified immunity protection is usually provided to "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

This Circuit has adopted a two-part analysis for applying the objective-reasonableness test to a qualified immunity defense. *Id.* First, the defendant public official must show that he acted within the scope of his discretionary authority when the allegedly wrongful act occurred. *Id.* Second, after the defendant has shown that he acted within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the defendant lacked good faith, that is, that the defendant's acts

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[2] Plaintiff also brought her claims for illegal arrest and malicious prosecution against defendant George.

violated clearly established statutory or constitutional law. *Id.* The second part of the analysis requires the Court to determine whether the applicable law was clearly established when the government action in question occurred and then whether the government official's conduct was in violation of clearly established law. *Id.* at 1487-88.

On these facts, the Court concludes that defendant George is entitled to the defense of qualified immunity on plaintiff's Fourth Amendment claim of illegal arrest and Fifth Amendment claim of malicious prosecution. Defendant George acted within the scope of his discretionary authority when he gave plaintiff her traffic citation. Further, a reasonable officer under these circumstances would have believed that giving plaintiff the traffic citation in this instance did not amount to an illegal arrest or malicious prosecution and therefore comported with the Fourth and Fifth Amendments. *Anderson v. Creighton,* 483 U.S. 635, 647 (1984). As concluded above, there is no factual basis for an illegal arrest or malicious prosecution in this action.

III. PLAINTIFF'S SUPPLEMENTAL STATE LAW CLAIMS

Defendants urge the Court to decline to exercise supplemental jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(c). While the exercise of supplemental jurisdiction is discretionary, *see Hubbard v. Stewart,* 651 F. Supp. 294 (M.D. Ga. 1987), if a district court dismisses a plaintiff's federal claims before trial, then, under *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966), the

court must dismiss the plaintiff's supplemental state law claims. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984); *accord Homes by Michelle, Inc. v. Federal Savings Bank*, 733 F. Supp. 1495, 1498 (N.D. Ga. 1990). Therefore, the Court dismisses plaintiff's state law claims.

IV. CONCLUSION

In summary, the Court GRANTS defendants City of Loganville and Terry Lynn Hewell's motion to dismiss [#4-1], GRANTS defendant Brian George's motion to dismiss [#5-1], and DISMISSES plaintiff's remaining state law claims.

IT IS SO ORDERED, this 27 day of April, 1993.

/s/ Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

ENTERED ON DOCKET
Apr. 29, 1993

By L.D.T., Clerk
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:93-cv-251-MHS

MARY OWENS, *et al.*,

Plaintiffs,

vs.

TERRY LYNN HEWELL, *et al.*,

Defendants.

JUDGMENT

This action having come before the court, Honorable Marvin H. Shoob, United States District Judge, for consideration of the defendants' motions to dismiss, and the court having granted said motions, it is

Ordered and Adjudged that the plaintiff take nothing, that the defendants recover their costs of this action, and the action be, and the same hereby is **dismissed.**

Dated at Atlanta, Georgia, this 29th day of April, 1993.

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

Prepared, Filed, and Entered in the
Clerk's Office
April 29, 1993

LUTHER D. THOMAS
Clerk

By: /s/ Sherry Gibbons
SHERRY GIBBONS
Deputy Clerk

APPENDIX D

[Filed Feb. 25, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8588

MARY OWENS, CLARENCE E. OWENS,
Plaintiffs-Appellants.

versus

TERRY LYNN HEWELL, individually and in his capacity as a Police Officer for the City of Loganville, Georgia, BRIAN GEORGE, individually as a Trooper for the Georgia State Patrol, CITY OF LOGANVILLE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR RREHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

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* Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
Chief Judge